Supreme Court, U.S.
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No. 05-587

IN THE

Supreme Court of the United States

MARK REED,

Petitioner,

v.

MICHAEL BALDWIN,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this 42 U.S.C. Section 1983 action, Respondent Michael Baldwin claims that Petitioner, Deputy Mark Reed used excessive force in violation of Mr. Baldwin's Fourth Amendment rights. Mr. Baldwin asserts that immediately after Deputy Reed entered the Baldwin residence to perform a search for suspected indoor marijuana cultivation, Deputy Reed encountered Mr. Baldwin and ordered him to the floor. Mr. Baldwin complied with the order. Mr. Baldwin claims that as he lay face down on the floor, Deputy Reed placed the barrel of his gun to the back of Mr. Baldwin's head for approximately 20 seconds before handcuffing Mr. Baldwin. Mr. Baldwin suffered no physical injury but was in fear for his life due to the possibility of accidental discharge of Deputy Reed's gun. Shortly thereafter, the deputies performing the search secured the Baldwin residence. Mr. Baldwin does not claim that Deputy Reed mistreated him in any other fashion or used any other force against him. The Ninth Circuit affirmed the district court's denial of Placer County Sheriff's Deputy Mark Reed's motion for summary judgment based upon the qualified immunity of good faith.

Two questions are presented:

1. In analyzing the preliminary issue on a question of qualified immunity in an excessive force case, whether the officer's conduct violated the Fourth Amendment, did the Ninth Circuit fail to account for governmental interests that justified the application of force during a residential search for drugs, at a point before the residence and the occupants were secured, and instead improperly focus on the profession of the suspect (dentistry) to conclude that officers performing such drug searches face minimal, if any, exigencies that might justify the use of force?

2. In analyzing the second issue on a question of qualified immunity, whether clearly established law reasonably informed the officer that the conduct in question was unlawful, did the Ninth Circuit's opinion that there is a clearly established right "to be free from battery by gun-wielding officers" ignore controlling Supreme Court precedent by formulating "clearly established law" at so general or abstract a level that the notice requirement was rendered meaningless?

LIST OF PARTIES

Petitioner

Mark Reed of Auburn, California.

Respondent

Michael Baldwin, of Carmichael, California

The following parties named in the caption of the underlying action have not petitioned for review: Placer County, Placer County Sheriff's Department, Brian Whigam, Keven Besana, Ron Goodpaster, Stephen L. D'Arcy and Tracy Grant.

Georgia Chacko was a prevailing party.

Jeff Potter has filed a separate petition for certiorari.

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The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Baldwin v. Placer County*, 405 F.3d 788 (9th Cir. 2005). (App., *infra*, A.) The Ninth Circuit amended its opinion and denied *en banc* review on August 8, 2005, 418 F.3d 966 (9th Circuit 2005). (App., *infra*, B.) The Ninth Circuit affirmed the April 2, 2004 unreported decision of the United States District Court for the Eastern District of California, D.C. No. CV-01-01177 - MCE. (App., *infra*, C.)

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1). The Ninth Circuit Court of Appeals entered its judgment on April 19, 2005. Following the denial of the petition for rehearing and rehearing en banc, the Ninth Circuit entered an amended judgment on August 8, 2005 and stated that it would not entertain any further petitions.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. In the summer of 1998, Petitioner, Deputy Mark Reed, learned from a confidential informant that Respondent Michael Baldwin and his then wife Georgia Baldwin (now Georgia Chacko) may be growing marijuana. Deputy Reed put the confidential informant in contact with Sergeant Keven Besana, the supervisor of the Placer County Sheriff Dept.'s Marijuana Eradication Team (MET). Deputy Reed was not a member of MET.

On September 16, 1998, MET Deputies Jeff Potter and Ron Goodpaster searched the garbage can placed out for collection in front of the Baldwin residence in Loomis, California. Deputy Potter found marijuana that the Baldwins assert was .08 grams of dried, burned plant material including stems, leaves and a seed, "barely recognizable" as marijuana, wrapped in burnt tissue paper. In his affidavit in support of the search warrant for the Baldwin residence, Deputy Potter described the material he found during the garbage search as "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh, green and still moist."

Based upon the marijuana discovered during the garbage search, the confidential informant's statement and other disputed corroborative evidence, Deputy Potter sought and obtained a search warrant for the Baldwin residence on September 23, 1998. Deputy Reed had nothing to do with obtaining the search warrant other than passing the information he received from the confidential informant on to Sgt. Besana.

In the early morning hours of September 23, 1998, Deputy Reed assisted the MET officers in entering, securing and then searching the Baldwins' home pursuant to the search warrant obtained by Deputy Potter. The deputies

entered the home through the unlocked front door. The Baldwins did not hear the deputies knock and announce themselves, and therefore assert that no knock and announcement occurred.

Michael Baldwin, who had been beneath the house tending to approximately 146 marijuana plants encountered Deputy Reed in the living room. Deputy Reed pointed his gun at Mr. Baldwin, who was wearing nothing but a t-shirt, and ordered him to the floor. Mr. Baldwin complied immediately.

Mr. Baldwin says that while he was lying face down on the floor, Deputy Reed put his knee on Baldwin's lower back, with minimal force, and put a gun to the back of his head for approximately 20 seconds before handcuffing him. Mr. Baldwin has no complaints about Officer Reed's conduct during that encounter other than the placing of the gun to the back of his head. Mr. Baldwin concedes that he suffered no physical injury during the search, only the emotional distress occasioned by having the gun placed to the back of his head before he was handcuffed.

2. On October 12, 2001, Georgia Chacko and Michael Baldwin filed their First Amended Complaint alleging, among other claims, a Section 1983 claim against Deputies Jeff Potter, Tracy Grant, Ron Goodpaster, Mark Reed and Sgt. Keven Besana for alleged Fourth Amendment violations. They alleged that Deputy Potter committed judicial deception and committed excessive force against Chacko, and that Deputy Reed committed excessive force against Baldwin. They alleged that all of the named officers conspired to violate their Fourth Amendment rights by committing judicial deception, and that they all used excessive force and conducted an unreasonable search. They alleged a *Monell* claim to the effect that Placer County had a policy, custom and practice of similar Fourth Amendment

violations. They further alleged that Deputy Brian Whigam violated their due process rights by giving false testimony in a preliminary hearing that led to the unsuccessful criminal prosecution of Baldwin and Chacko for alleged cultivation of marijuana for sale. They also alleged that Undersheriff Steven D'Arcy defamed them in a press release following their arrest. They alleged a RICO violation and claims for equitable relief. They also alleged pendent state law claims. Because of the Section 1983 claims, 42 USC Section 1343 (3) conferred jurisdiction over their complaint in the United Stated District Court.

On May 20, 2003, all defendants filed a motion for summary judgment as to all claims based upon the plaintiffs' failure to respond to discovery. However, the plaintiffs responded to discovery before the motion was heard. Therefore, the District Court denied the motion in part, but granted it as to the defamation claim against Undersheriff D'Arcy.

On December 7, 2003, the remaining defendants filed a second motion for summary judgment. The District Court heard the motion on January 26, 2004 and took it under submission. On April 2, 2004, the District Court issued its order granting in part, and denying in part the motion for summary judgment.

The April 2, 2004 order took note that Baldwin and Chacko had abandoned their RICO claim, their pendent false arrest and false imprisonment claims and their claims for equitable relief. The Court granted summary judgment in favor of defendant Brian Whigam as to the due process claim arising out of his testimony at a preliminary hearing. The Court also granted summary judgment in favor of all deputies other than Potter and Reed on plaintiffs' excessive force claims and in favor of all deputies on plaintiffs' unreasonable seizure claims.

Because it found disputed material facts, the district court denied summary judgment on the judicial deception claim against Potter, and the excessive force claims against Potter and Reed. For the same reason, the district court further denied summary judgment as to plaintiffs' claim that Potter, Goodpaster, Besana, Grant and Reed conspired to violate plaintiffs' civil rights, and as to the plaintiffs' *Monell* claim against the County of Placer and the Placer County Sheriff's Department.

On April 28, 2004, Appellants Jeff Potter, Mark Reed, Ron Goodpaster, Keven Besana, Tracy Grant, the County of Placer, and the Placer County Sheriff's Deptartment filed their notice of appeal of the April 2, 2004 order. As they had in the district court, the appellants requested that for purposes of the summary judgment and the interlocutory appeal, all disputes of material fact be resolved in favor of the plaintiffs so that the Court could determine whether or not plaintiffs' version of the facts supported a claim for relief. The Ninth Circuit affirmed the district court's April 2, 2004 order in *Baldwin v. County of Placer*, 405 F.3d 778 (9th Cir. 2005).

On May 3, 2005, Appellants filed a Petition for Rehearing or Rehearing En Banc. On August 8, 2005, the Ninth Circuit amended the opinion and denied rehearing or rehearing en banc in *Baldwin v. County of Placer*, 418 F.3d 966 (9th Cir. 2005).

As to excessive force claims against Petitioner Mark Reed, the Ninth Circuit held that:

> Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. The officers had

> stated no belief that the plaintiffs would be armed; they mentioned no criminal history or conspiracy that could have justified such a belief. They had no reason not to identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil rights of plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984. *McKenzie v. Lamb*, 738 F.2d 1005, 1010 (9th Cir. 1984) (Kennedy, J.)

Baldwin v. County of Placer, 418 F.3d 966, 970 (9th Cir. 2005). The Ninth Circuit further held that "governmental interests are at a minimum when the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife." *Id.* at 970.

REASONS FOR GRANTING THE PETITION

This Petition for Review of Certiorari is sought because the August 8, 2005 opinion has decided the question of qualified immunity of good faith in the context of alleged excessive force in a way that directly conflicts with *Brosseau v. Haugen*, 160 L.Ed.2d 583, 590 (2004) and *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Both *Brosseau* and *Saucier* resulted in reversals of the Ninth Circuit for setting "clearly established law" at too abstract a level to inform officers

whether or not their conduct was lawful. In *Baldwin*, the Ninth Circuit divined a broad right "to be free from battery by gun-wielding officers, a right established in this circuit since 1984" from a case so factually distinct that a reasonable officer could not have predicted that it would result in liability based upon the present facts. The case relied upon by the Ninth Circuit in *Baldwin* for this "clearly established" right "to be free from battery by gun-wielding officers" is *McKenzie v. Lamb*, 738 F.2d 1005, 1010 (9th Cir. 1984) (Kennedy, J.).

Moreover, in undertaking the first step in determining the question of qualified immunity; i.e., determining whether or not the conduct in question violated the Fourth Amendment, the August 8, 2005 opinion ignored the teachings of *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981). In *Michigan v. Summers,* this Court acknowledged the inherent dangers facing officers conducting residential searches for drugs. However, the Ninth Circuit reached a flawed and class based conclusion that, in the absence of specifically articulated concerns about violence, criminal histories or weapons, searching the home of a white collar professional for suspected illegal drugs presents trivial, if any, risks to the searching officers. Because the Ninth Circuit improperly minimized the risks associated with residential searches for drugs and improperly assumed that all dentists are not dangerous, even those suspected of harboring illegal drugs in their homes, it rejected the argument that the exigencies inherent in any drug search, justifies an officer's drawing, pointing and even touching a suspect with a weapon for a limited time before the suspect is handcuffed and the residence secured.

1. The Failure to Acknowledge the Exigencies of Residential Searches for Drugs as Required by *Michigan v. Summers*, and Unwarranted Deference to Plaintiff's Occupation, Skewed the Panel's Analysis of a Fourth Amendment Violation in this Case

It is now clear that the first question a court must answer in analyzing a claim of qualified immunity in an excessive force case is whether or not the conduct violates the Fourth Amendment. *Saucier v. Katz* 533 U.S. 194, 200-201 (2001). That question requires the Court to balance the justification for the force against nature of the force employed to determine whether the force was objectively reasonable under all of the facts and circumstances known to the officer. *Id.* at 205.

In *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981), the Supreme Court stated the following sensible proposition in analyzing the justification for the use of force (in that case, a detention) during a drug search:

> Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. **Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence**

> **or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.** (Emphasis added.)

Given that the officers suspected that criminal activity was occurring in Michael Baldwin's home, Mr. Baldwin's occupation as dentist cannot by itself support, and indeed may bear no cognizable relevance to, the Court's conclusion that the governmental interests justifying the use of force were "at a minimum." What justification is there for the court's class-based conclusion that, because the owner of the home where marijuana was being grown has a white-collar job, the officers faced no significant exigency? If Mr. Baldwin had been a plumber or unemployed, would the Court have reached a different conclusion? How does the Court's holding guide officers in the future?

The Supreme Court's analysis in *Summers* takes into account that officers cannot predict how criminal suspects, including dentists suspected of cultivating marijuana in their homes, will react to residential searches. Judges may not measure exigency of the situation faced by officers with the benefit of hindsight. *Graham v. Connor*, 490 U.S. 386, 396-397 (1986). While not as tense, rapidly evolving and uncertain as a search of a crack den for weapons, a residential search necessarily carries with it some degree of exigency that officers can minimize only by " . . . exercising unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981). "Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler v. Mena*, 125 S. Ct. 1465, 1470 (2005).

The force used by Officer Reed was frightening, but did not cause any physical injury. However, given the justification of a residential search for drugs at a point where neither the residence nor the suspects are secured, if Deputy Reed had pointed his weapon at Mr. Baldwin's head prior to handcuffing him, that conduct would clearly not be considered excessive force. See *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 191-192 (1st Cir. 1998) (pointing weapon at a person attempting to enter a home being searched is not unreasonable); *United States v. Sinclair*, 983 F.2d 598, 602-603 (4th Cir. 1993) (pointing weapons at persons stopped for suspected drug or weapons offensive is not unreasonable); *Robinson v. County of Solano*, 278 F.3d 1007 (9th Cir. 2002) (*en banc*) (pointing weapon at the face of a compliant individual from a distance of three feet and without any justification is unreasonable, but not clearly so); *Thompson v. City of Lawrence*, 58 F.3d 1511, 1516 (10th Cir. 1995) (pointing weapon at suspect during entry into the home of a felon not unreasonable.)

In *Robinson*, decided nearly four years after the search at issue in this case, the Ninth Circuit found that pointing a gun at the face of plaintiff from three feet away violated plaintiff's Fourth Amendment rights, but that defendants were nonetheless entitled to qualified immunity. There, two officers approached the plaintiff as he stood alone, outside and in the open. *Robinson*, *supra*, 278 F.3d at 1016. The officers were responding to a report of a misdemeanor. The Court noted that the officers had no justification for the use of any force under the facts of that case. *Id.* at 1014. However, because prior Ninth Circuit case law could be read to suggest that pointing a weapon, without more, never constitutes excessive force, the officers did not have notice that pointing a weapon at the face of a compliant and clearly unarmed individual was excessive force. *Id.* at 1015-1016. The case law in other circuits was no clearer. *Id.* at 1016.

As in *Baldwin*, the officers in *Robinson* used force that was frightening, but that did not cause any physical injury. Clearly, the plaintiff in *Robinson* shared Mr. Baldwin's fear of being killed by an accidental discharge. However, unlike Deputy Reed in *Baldwin*, the officers in *Robinson* lacked any justification for pointing their guns at Mr. Robinson's head from a distance of three feet. *Id.* at 1014-1015. Therefore, their assault on Mr. Robinson violated his Fourth Amendment right to be free from excessive force. *Id.* at 1015.

There is little difference between the battery by Officer Reed and the assault by the officers in *Robinson* (Reed's gun was three feet closer to, and touching, the plaintiff's head). Reed's conduct was brief, caused no physical injury, and ended once he handcuffed Baldwin. Baldwin does not accuse Reed of any other inappropriate behavior while in his home. However, Deputy Reed faced the exigent circumstances inherent in a residential search for drugs, while no justification existed for the assault by the officers in *Robinson*.

Therefore, the similarity between the force alleged in *Baldwin* and the force alleged in *Robinson*, combined with differences in the justification for those respective uses of force, call into question the Ninth Circuit's conclusion that Deputy Reed's conduct constituted excessive force. Mr. Baldwin's allegations against Deputy Reed may constitute the tort of battery, but they should be deemed insufficient to constitute a Fourth Amendment violation. The Ninth Circuit has inappropriately second guessed Deputy Reed's conduct with the benefit of 20/20 hindsight and failed to consider his conduct from the perspective of a reasonable officer facing the dangers inherent in searching an unsecured house for illegal drugs. See *Graham v. Connor*, 490 U.S. 386, 396-397 (1986).

Nonetheless, assuming that the Ninth Circuit was correct that under the facts of *Baldwin,* putting a gun to the back of Mr. Baldwin's head before handcuffing him violated his Fourth Amendment rights, principled reasons why the Ninth Circuit denied qualified immunity for Reed's battery after granting qualified immunity to the officers for their assault in *Robinson* remain difficult to discern. Indeed, the *Robinson* majority rejected the one obvious distinction between *Baldwin* and *Robinson.* The majority opinion in *Robinson* expressly rejected the analysis of the concurrence that would have drawn a bright line between assaults and batteries so that only the latter would give rise to a constitutional claim for excessive force. *Id.* at 1017.

Why then do the facts of *Robinson* support qualified immunity while conduct that is no more threatening, and clearly more justified, failed to support qualified immunity for Deputy Reed? The answer lies in the *Baldwin* panel's refusal to follow this Court's precedent in *Brosseau* and *Saucier* with respect to the requirement that "clearly established law" inform the officer of the unlawfulness of certain conduct.

2. No Prior Federal Decision Has Held that During a Residential Search for Drugs, An Officer Violates the Fourth Amendment by Putting a Gun to the Head of an un-handcuffed Resident Before the Residence is Secured

As stated in *Saucier*, 533 U.S. at 202: "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Here, the Ninth Circuit relies upon *McKenzie v. Lamb*, 738 F.2d 1005, 1010 (9th Cir. 1984) (Kennedy, J.) for the proposition that since 1984, Ninth Circuit law has

clearly established that the Baldwins had a right to be "free from battery from gun wielding officers." (*Baldwin, supra,* 418 F.3d at 670.) As explained below, the law may be clearly established that helpless persons have a right to be free from assaults with weapons or batteries with weapons by police officers, and persons not suspected of any wrongdoing may have the same right, but Mr. Baldwin was neither innocent nor helpless at the time of the alleged battery.

The *Baldwin* panel's interpretation of *McKenzie* repeats the error that resulted in the Supreme Court's reversal of the Ninth Circuit in both *Saucier* and *Brosseau v. Haugen*, 160 L.Ed.2d 583 (2004). In *Baldwin, Saucier, and Brosseau* the Ninth Circuit read precedent too generally in determining what law is "clearly established" for purposes of qualified immunity. In *Brosseau*, 160 L.Ed.2d at 589, the Court equated the requirement of "clearly established" law to defeat qualified immunity with fair notice:

> Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

Here, no precedent fairly notified Deputy Reed that putting a gun to the back of Mr. Baldwin's head during a residential search for marijuana cultivation, shortly after entry *and*

before handcuffing Baldwin and securing his residence, constituted excessive force.

The facts of the *McKenzie* case do not resemble this case and therefore do not provide fair notice that Deputy Reed's conduct is unlawful. In *McKenzie*:

> Appellants . . . offered evidence that the defendant plain-clothes officers, some dressed as bellhops and busboys, burst into the hotel room with weapons drawn, forced appellants against the wall, handcuffed them, and threw them to the floor. The defendants, according to appellants, then pressed the barrels of their guns against appellants' heads and refused to identify themselves as police officers, in spite of repeated requests and pleas. When finally told that the assailants were police officers, Herndon asked to see official identification. He alleges, in testimony corroborated by Michael Hazelton, that an officer pressed the barrel of a gun between his eyes and replied, "that's about all [the identification] you need."
>
> The appellants asked why they were being treated so roughly; the gist of the officers' alleged reply was: You are in Las Vegas, Nevada, and we do things the way we please out here.

McKenzie v. Lamb, 738 F.2d 1005, 1010-1011 (9th Cir. 1984).

Crucially, in *McKenzie*, officers lacking probable cause for arrest, committed batteries on the plaintiffs with their weapons *after the plaintiffs were handcuffed.* The plaintiffs in *McKenzie* were not merely compliant, they had been handcuffed and were therefore helpless at the time that the officers put guns to their heads. See *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (re the Ninth Circuit's conclusion that the law is clearly established that the use of weapons on helpless suspects constitutes excessive force.) The officers in *McKenzie* lacked any purpose other than to frighten and intimidate the plaintiffs, who were in fact innocent of any crime. Indeed, the Court's conclusion that excessive force occurred would have been the same had the officers in *McKenzie* pointed their weapons without placing the barrels to the plaintiffs' heads. See *Robinson*, *supra*, 278 F.3d at 1014-1015; *Turmon v Jones*, 402 F.3d 202, 207-208 (4th Cir. 2005) (clearly established that pointing weapon at the face of completely compliant person not suspected of any crime then jerking him from his room and handcuffing him is excessive force.); *Holland v. Harrington*, 268 F.3d 1179, 1192-1193 (10th Cir. 2001) (clearly established that pointing weapons at unarmed children posing no threat, and not capable of a threat, is excessive force).

The majority opinion in *Robinson* relied in part on *McKenzie* for its conclusion that pointing a gun at an unarmed person suspected of committing a misdemeanor at some earlier time, and without any officer safety justification, constituted excessive force in violation of the Fourth Amendment. *Robinson, supra,* 278 F.3d at 1014-1016. Nonetheless, neither *McKenzie* nor the other authority cited therein fairly notified the officers in *Robinson* that their

conduct violated the Fourth Amendment, so those officers were entitled to qualified immunity. *Robinson,* 278 F.3d at 1013 and 1014.

The *McKenzie* opinion provides no better notice to Deputy Reed for his alleged conduct in this case than it provided to the officers in *Robinson.* Michael Baldwin admits that unlike the officers in *McKenzie*, Reed did not terrorize an already handcuffed and therefore helpless suspect. Reed's alleged conduct occurred before Mr. Baldwin, and his residence, were fully under control. Reed's conduct was of short duration and it ceased when he handcuffed Baldwin. Reed did not physically or verbally mistreat Mr. Baldwin in any other way. Lastly, Reed reasonably suspected Baldwin of criminal misconduct; i.e., cultivating marijuana in his home.

As stated in *Saucier v. Katz*, 533 U.S. 194, 206 (2001), "[q]ualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (CA11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Even if the Ninth Circuit correctly took the opportunity to clearly establish that putting a gun to the back of a compliant suspect's head during a residential search for drugs, before the suspect is handcuffed and the residence is secured, constitutes excessive force, pre-existing case law did not so notify Deputy Reed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Auburn, CA 95603

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL W. BALDWIN, DDS; GEORGIA CHACKO,

Plaintiffs-Appellees.

v.

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFERY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, Officer,

Defendants-Appellants.

No. 04-15848
D.C. No.
CV-OI-01177-MCE
ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 18, 2005---San Francisco, California

Filed April 19, 2005
Amended August 8, 2005

Before: John T. Noonan, Sidney R. Thomas, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

David K. Huskey, Auburn, California, for the defendants-appellants.

J. David Nick and Paul R. Turley, San Francisco and Oakland, California, for the plaintiffs-appellees.

Kate Wells, Santa Cruz, California, for plaintiff-appellee Georgia Chacko.

ORDER

The opinion filed on April 19, 2005 is amended as follows:

At slip op. p. 4410, l. 3-4, change sentence to read: "On the conceded facts before us, whatever exigency existed was insufficient to justify the batteries."

At slip op. p. 4410, at the end of the first paragraph ending "a practicing dentist and his wife.", add "We conclude that 'the law at th[e] time [of the search] . . . clearly establish[ed] that the officer's conduct could violate the Constitution.' *Brosseau* v. *Haugen*, 125 S.Ct. 596, 599 (2005)."

At slip op. p. 4411, at the end of the second paragraph ending "bleached out.", add a new paragraph.

> The County invokes a fundamental case on the Fourth Amendment, *Franks* v. *Delaware*, 438 U.S. 154 (1978). *Franks* does permit a court to purge the false statements and to sustain the warrant if the unpurged residue would justify it. But what will sustain the warrant must already be within it. The County is pointing to evidence not cited in the warrant. That evidence cannot sustain the warrant. *See United States* v. *Davis*, 714 F.2d 896, 899 (9th Cir. 1983) (under *Franks*, "[t]he fact that probable

cause did exist and could have been established by a truthful affidavit does not cure the error.").

With this amendment, the panel has voted to deny the petition for rehearing. Judges Thomas and Fisher have voted to deny the petition for rehearing en banc and Judge Noonan has so recommended

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

The panel will not entertain any new petitions for rehearing or petitions for rehearing en banc.

OPINION

NOONAN, Circuit Judge:

Placer County and several of its police officers (collectively, the County) have taken this interlocutory appeal from the district court's denial of their motion for qualified immunity in this 42 U.S.C. § 1983 action brought by Michael Baldwin and Georgia Chacko (the plaintiffs). On the basis of the facts conceded as undisputed by the County for purposes of this appeal, we hold that the County violated established constitutional rights of the plaintiffs and that qualified immunity was properly denied.

FACTS

On September 22, 1998, Jeff Potter, an officer of the marijuana eradication team (MET) of the County's Sheriff Department, applied for a search warrant for the residence of

Michael Baldwin and Georgia Chacko, then Baldwin's wife. The affidavit stated that on July 16, 1998, Deputy Mark Reed had told Sergeant Kevin Besana that "a citizen informant" had told him that Michael Baldwin, a dentist, was "possibly growing marijuana." The date when this information was given and the date when Baldwin was possibly growing marijuana were not stated in the affidavit. Potter stated that Besana had passed this tip to him and that four days after receiving it, he confirmed Baldwin's office address as a dentist and obtained the registration number of his car; Potter used the car registration to confirm the informant's statement as to Baldwin's home address. A check of DMV records showed Baldwin to be 35 years-old, 5' 9", weighing 165 pounds and Georgia Chacko to be 34 years-old, 5' 5", weighing 125 pounds.

On September 16, 1998, so the affidavit continues, Potter searched the trash at Baldwin's home address. He found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist." He also, he said, had found "marijuana seeds and a hydroponic grow rock. There were also two black 1/2 gallon planting pots commonly used in indoor marijuana grows and four packages of 'rain drop' irrigation equipment commonly used in indoor marijuana grows." He concluded on the basis of his specific training in the investigation of narcotics and his ten years of experience in approximately three hundred narcotics cases that "[t]he items found in the trash inspection reveal an ongoing criminal activity to grow marijuana indoors." He also concluded that "it is common for persons involved in the cultivation of marijuana to also be involved in the sale of marijuana." Potter sought a warrant listing the documents and property he expected to find; he did not mention guns. On September 23, 1998, a state court judge issued the search warrant that Potter sought.

According to the plaintiffs' evidence, the only marijuana in their trash searched by Potter were blackened bits of marijuana wrapped in a paper towel, the remnants of smoked marijuana. They bolster their claim of falsity in Potter's affidavit by thirteen declarations from other individuals whose trash was searched by MET. In each instance MET officers swore they found "marijuana leaves and stems recently cut from a mature marijuana plant" and that "the marijuana was fresh green and still moist." In each instance, these thirteen individuals swore they placed no marijuana or products of marijuana in their trash.

The Baldwins' further evidence is that the "rain drop" irrigation equipment was only for outdoor landscaping and that this fact should have been obvious to a trained narcotics investigator. The equipment included a sprinkler spraying water up to 14 feet, a soaker hose, and 6" heavy duty support stakes; none of these items are used in an indoor grow. The two black gardening pots pointed to no illegal activity. The "grow rock" in Potter's affidavit was, the plaintiffs also state, a lava rock with no implication of criminal activity.

In the early dawn of the day that Potter obtained the warrant, according to the sworn declaration of Michael Baldwin, a group of five officers including Potter entered Baldwin's home "para-military style" without knocking. Officer Reed encountered Baldwin as Baldwin came into the house from the back door. Reed pointed his gun at him and ordered him to lie down. Baldwin complied with the order. Reed "then pushed his gun at the rear of [Baldwin's] head and placed his knee in the small of [Baldwin's] back, all the while pressing a loaded firearm against the back of [Baldwin's] head." Baldwin was terrified that the gun would go off.

According to the sworn deposition of Georgia Chacko, she was clothed only in a T-shirt and cotton briefs and just

getting up to start her day when she opened her bedroom door to be confronted by a flashlight in her face and fingers sharply poking five to seven times at her throat and forcing her back into the bedroom. A voice told her to get on the floor. A gun was pointed at her, then brought into contact with her head for 30 seconds. She got on the ground The unidentified gunman kneed her in the small of her back and handcuffed her. The gunman was Potter.

PROCEEDINGS

On October 12, 2001, the plaintiffs filed their first amended complaint. The County moved for summary judgment on the ground of the qualified immunity of the officers. On April 2, 2004, the district court denied the motion, ruling that triable material issues of fact existed as to the plaintiffs' claims of excessive force, judicial deception, and conspiracy by the MET team, all in violation of 42 U.S.C. § 1983; state law claims similarly remained open to credibility determinations by a jury.

The County appeals.

ANALYSIS

[1] *Jurisdiction.* Where there is a dispute as to material issues of fact, we have no jurisdiction. *Johnson v. Jones, 515* U.S. 304, 313 (1995). On the face of the district court's decision finding disputed facts, we are prevented from proceeding further. The County avoids dismissal, however, by stating that it "accepted the Baldwins' evidence for purposes of summary judgment, thereby obviating any alleged factual disputes" and that therefore "no factual disputes preclude appellate jurisdiction over this interlocutory appeal." The appeal is directed only to denial of immunity if the plaintiffs' facts are accepted; so the appeal is directed to appealable issues of law. *Mitchell v. Forsyth,* 472 U.S. 511,

530 (1985). Although the defendants have found it hard to stick to their concession and occasionally appear to dispute the facts, we take them at their word and for this appeal accept only the plaintiffs' version of what happened. The facts for this appeal are not alleged, they are admitted. Consequently, we have jurisdiction.

[2] *Excessive force.* The County argues that "objectively reasonable" officers could have believed that "the exigency of the entry" justified the batteries on the plaintiffs. On the conceded facts before us, whatever exigency existed was insufficient to justify the batteries. Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. The officers had stated no belief that the plaintiffs would be armed; they mentioned no criminal history or conspiracy that could have justified such a belief. They had no reason not to identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil right of the plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984. *McKenzie v. Lamb,* 738 F.2d 1005, 1010 (9th Cir. 1984) (Kennedy, J.). Potter's fingers at the throat of Baldwin's wife constitute a separate battery that a reasonable officer would know was excessive. The governmental interests in using handcuffs are at their maximum when "a warrant authorizes a search for weapons and a wanted gang member resides on the premises." *Muehler v. Mena,* 125 S. Ct. 1465, 2005 WL 645221 at *4 (March 22, 2005). Conversely, governmental interests are at a minimum when the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife. We conclude that "the law at th[e] time [of the search] . . . clearly establish[ed] that the officer's conduct could violate the constitution." *Brosseau v. Haugen,* 125 S.Ct. 596, 599 (2005).

[3] *Judicial Deception.* The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate. This obvious truth is met by the County with the argument that we should redact Potter's affidavit, purge it of its lies, and find what remains sufficient to justify the issuance of the warrant. *See Liston v. County of Riverside,* 120 F.3d 965, 972 (9th Cir. 1997). Objectively, the County adds, there was enough to justify a search. Its arguments are unpersuasive.

First, when Potter's lies are taken out, what is left is an unidentified citizen at an unidentified date telling a sheriff's deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous. No magistrate could have authorized a search on this basis, essentially amounting to an informant's tentative tip.

[4] Second, the County shifts its ground in arguing that "objectively" - that is, not within Potter's affidavit - there were facts justifying the search: .08 grams of burnt marijuana, "'virtually unrecognizable as marijuana," are conceded to have been in the trash by the plaintiffs. The County cites in support of its argument *Devenpeck v. Alford,* 125 S. Ct. 588 (2004), holding that not the officer's motive in making an arrest but the objective circumstances are to be considered by a court judging the officer's action. *Devenpeck* does not speak to our case. Here, it is what facts were alleged to induce the magistrate to act. Plainly, Potter's lies were substantial in moving the magistrate. The force of the lies on the mind of the magistrate cannot be bleached out.

The County invokes a fundamental case on the Fourth Amendment, *Franks v. Delaware,* 438 U.S. 154 (1978). *Franks* does permit a court to purge the false statements and

to sustain the warrant if the unpurged residue would justify it. But what will sustain the warrant must already be within it. The County is pointing to evidence not cited in the warrant. That evidence cannot sustain the warrant. *See United States v. Davis,* 714 F.2d 896, 899 (9th Cir. 1983) (under *Franks,* "[t]he fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.").

[5] The plaintiffs' established civil rights were violated by presentation of the false affidavit. *Liston,* 120 F.3d at 972-73. Qualified immunity was rightly denied.

[6] *Conspiracy.* Conspiracy to violate a citizen's rights under the Fourth Amendment by lying to the magistrate is evidently as much a violation of an established constitutional right as the perjury itself. Whether there is sufficient evidence of the conspiracy is for a jury to decide. No immunity exists for the conspiracy.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL W. BALDWIN, DDS; GEORGIA CHACKO,

Plaintiffs-Appellees.

v.

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFERY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, Officer,

Defendants-Appellants.

No. 04-15848
D.C. No.
CV-OI-01177-MCE
OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 18, 2005-San Francisco, California

Filed April 19, 2005

Before: John T. Noonan, Sidney R Thomas, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

David K. Huskey, Auburn, California, for the defendants-appellants.

J. David Nick and Paul R. Turley, San Francisco and Oakland, California, for the plaintiffs-appellees.

OPINION

Placer County and several of its police officers (collectively, the County) have taken this interlocutory appeal from the district court's denial of their motion for qualified immunity in this 42 U.S.C. § 1983 action brought by Michael Baldwin and Georgia Chacko (the plaintiffs). On the basis of the facts conceded as undisputed by the County for purposes of this appeal, we hold that the County violated established constitutional rights of the plaintiffs and that qualified immunity was properly denied

FACTS

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showed Baldwin to be 35 years-old, 5' 9", weighing 165 pounds and Georgia Chacko to be 34 years-old, 5' 5", weighing 125 pounds.

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[1] *Jurisdiction.* Where there is a dispute as to material issues of fact, we have no jurisdiction. *Johnson v. Jones, 515* U.S. 304, 313 (1995). On the face of the district court's decision finding disputed facts, we are prevented from proceeding further. The County avoids dismissal, however, by stating that it "accepted the Baldwins' evidence for purposes of summary judgment, thereby obviating any alleged factual disputes" and that therefore "no factual disputes preclude appellate jurisdiction over this interlocutory appeal." The appeal is directed only to denial of immunity if the plaintiffs' facts are accepted; so the appeal is directed to appealable issues of law. *Mitchel/ v. Forsyth,* 472 U.S. 511, 530 (1985). Although the defendants have found it hard to stick to their concession and occasionally appear to dispute the facts, we take them at their word and for this appeal accept only the plaintiffs' version of what happened. The facts for this appeal are not alleged, they are admitted. Consequently, we have jurisdiction.

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identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil right of the plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984. *McKenzie v. Lamb,* 738 F.2d 1005, 1010 (9th Cir. 1984) (Kennedy, J.). Potter's fingers at the throat of Baldwin's wife constitute a separate battery that a reasonable officer would know was excessive. The governmental interests in using handcuffs are at their maximum when "a warrant authorizes a search for weapons and a wanted gang member resides on the premises." *Muehler v. Mena,* 125 S. Ct. 1465, 2005 WL 645221 at *4 (March 22, 2005). Conversely, governmental interests are at a minimum when the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife.

[3] *Judicial Deception.* The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate. This obvious truth is met by the County with the argument that we should redact Potter's affidavit, purge it of its lies, and find what remains sufficient to justify the issuance of the warrant. *See Liston v. County of Riverside,* 120 F.3d 965, 972 (9th Cir. 1997). Objectively, the County adds, there was enough to justify a search. Its arguments are unpersuasive.

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[4] Second, the County shifts its ground in arguing that "objectively" - that is, not within Potter's affidavit - there were facts justifying the search: .08 grams of burnt marijuana, "virtually unrecognizable as marijuana," are conceded to have been in the trash by the plaintiffs. The County cites in support of its argument *Devenpeck v. Alford*, 125 S. Ct. 588 (2004), holding that not the officer's motive in making an arrest but the objective circumstances are to be considered by a court judging the officer's action. *Devenpeck* does not speak to our case. Here, it is what facts were alleged to induce the magistrate to act. Plainly, Potter's lies were substantial in moving the magistrate. The force of the lies on the mind of the magistrate cannot be bleached out.

[5] The plaintiffs' established civil rights were violated by presentation of the false affidavit. *Liston*, 120 F.3d at 972-73. Qualified immunity was rightly denied.

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AFFIRMED.

APPENDIX C

FILED
April 2, 2004
Clerk, U.S. District Court
Eastern District of California
By: _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGIA CHACKO, an individual and MICHAEL BALDWIN, an individual,

Plaintiffs,

v.

PLACER COUNTY, PLACER COUNTY SHERIFF'S DEPARTMENT, OFFICER TRACY GRANT, OFFICER RON GOODPASTER, OFFICER KEVIN BESANA, OFFICER BRIAN WIGGAM, OFFICER JEFF POTTER, OFFICER REED, OFFICER STEPHEN D'ARCY, and DOES ONE to FIFTY,

Defendants.

No. Civ.S-01-1177 MCE GGH

MEMORANDUM AND ORDER

Georgia Chacko and Michael Baldwin (collectively, the "Plaintiffs") have brought the present action against Defendants Placer County, Placer County Sheriff's Department, Officer Tracy Grant, Officer Ron Goodpaster, Officer Kevin Besana, Officer Brian Wiggam, Officer Jeff Potter, Officer Reed and Officer Stephen D'Arcy (collectively, the "Defendants").

Plaintiffs allege a variety of state and federal law violations, including Constitutional violations, false arrest, assault, battery, defamation and RICO violations. Defendants now move for summary judgment or, in the alternative, summary adjudication. For the reasons below, Defendants' motion is granted in part and denied in part.

BACKGROUND

This suit arises out of the search of Plaintiffs' home, and Plaintiffs' subsequent arrest, by members of the Placer County Sheriffs Marijuana Eradication Team ("MET"). That team was comprised of Officers Potter, Reed, Goodpaster, Besana and Grant, all of whom are named as Defendants herein.

Prior to executing their search of Plaintiff's home on September 23, 1998, a state court judge issued the requisite warrant based on a statement of probable cause by Officer Potter. Potter claimed he initially learned that Plaintiffs might be cultivating marijuana through a confidential informant, and alleged that a subsequent search of garbage left at Plaintiffs' residence, located at 5355 Moss Lane in Loomis, California, revealed the presence of a small amount of "marijuana leaves and stems recently cut from a mature marijuana plant" that were "fresh green and still moist." In addition, Potter alleged he discovered irrigation equipment, pots and "grow" rock in Plaintiffs' trash also pointing to marijuana cultivation.

Plaintiffs, for their part, deny that they ever placed marijuana cuttings in their trash, and assert even more fundamentally that the marijuana plants they did have were not "mature" as claimed by Officer Potter. With respect to the blackened bits of marijuana that were found in their garbage wrapped in a paper towel, Plaintiffs argue that such material was simply remnants of smoked marijuana. Significantly, they point to some thirteen declarations (attached as Exhibit "S" to the Turley Declaration in opposition to this Motion), all from individuals whose trash was searched by the MET Team and who denied placing marijuana products in their garbage, despite claims by MET Team members that the trash searches in question revealed exactly the same "marijuana leaves and stems recently cut from a mature marijuana plant" that were "fresh green and still moist."[1]

Plaintiffs further contend that it should have been obvious to any drug enforcement officer that the irrigation equipment was for outside landscaping use as opposed to inside marijuana cultivation.

According to Plaintiffs, all this evidence raises questions as to the MET Team members' truthfulness, and particularly to whether Officer Potter may have misled the state court judge in obtaining a search warrant for Plaintiffs' home.

With respect to the search itself, Plaintiffs contend that their rights were violated by MET Team members who, rather than knock and announce their presence, simply "entered the residence para-military style" and "terrorized and manhandled" them both. (Baldwin Declaration, ¶ 6, Chacko Declaration, ¶ 2).[2] Plaintiff Baldwin claims that

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[1] For purposes of this motion, Defendants' evidentiary objections to these declarations are overruled

[2] Defendants' evidentiary objections to Plaintiff's declarations are

Officer Reed placed a gun to the back of Baldwin's head and a knee into the small of his back despite the fact that Baldwin alleges he never offered any resistance or posed any threat. Similarly, Plaintiff Chacko claims that Officer Potter confronted her in her bedroom, immediately jammed his fingers into her trachea, and forced her to the ground with a gun to her head. Given the fact she was wearing only underwear and a "small t-shirt top", Plaintiff Chacko argues she was "visually groped" by a group of officers, including Defendants Potter and Goodpaster. According to Plaintiff, when Potter helped the handcuffed Chacko put on a pair of pants, his face was only a few inches from her waist. (Chacko Declaration, ¶ 4). Like her then-husband Plaintiff Baldwin, Georgia Chacko alleges she was treated in this manner despite the fact she offered no resistance and posed no threat to the officers.

Plaintiffs do not dispute that some 146 marijuana plants, including some fifty unrooted clones, were discovered by the MET team in the course of searching their residence. Plaintiffs claim, however, that the MET Team ignored their requests to consider the prescription posted on the premises for medical marijuana use, stating that the provisions of Proposition 215 (California Health and Safety Code § 11362.5, meant nothing to them.

Plaintiffs do take issue with Defendants' claim that they were marketing the marijuana grown in their home. They contend that Defendant Whigam, an officer whose only role in this case was to testify at Plaintiffs' Preliminary Hearing, lied about the projected yields of Plaintiffs' marijuana plants as well as the reasonable dosage amount, all

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overruled with respect to those portions of said declarations cited by the Court in this Order. Otherwise, to the extent the declarations were not relied on by the Court in ruling on this Motion any remaining objections need not be considered.

to create the impression that the marijuana involved was far more than that needed for Plaintiffs' own personal consumption. They further contend that Defendant D'Arcy, the Undersheriff of Placer County, defamed Plaintiffs through untrue allegations contained within a press release that effectively destroyed Plaintiff Baldwin's dental practice.

On or about May 20, 2003, Defendants moved for summary judgment, primarily on grounds that Plaintiffs' failure to respond to requests for admission provided the necessary evidentiary support. Defendants also argued, however, that Plaintiffs could not state an excessive force claim in any event[3] with respect to the manner in which Plaintiffs were arrested because they were entitled to qualified immunity. Plaintiffs further contended that Undersheriff D'Arcy's claims were privileged as a matter of law pursuant to both California Civil Code § 47(a) and California Government Code § 821.6. While this Court permitted Plaintiffs to withdraw their admissions (and file delayed responses to Defendants' requests for admissions) by Memorandum and Order filed July 8, 2003, it did reject Plaintiff's qualified immunity claim, reasoning on page 11 that any determination as to the events of September 23, 2002

> "requires a credibility determination of the various parties involved. Such a determination is squarely within the province of a jury. See Hoover v. Switlik Parachute Co., 663 F.2d 964, 968 (9th Cir. 1981) (citing Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628, 64 S. Ct.724, 88 L. Ed. 967 (1944). Accordingly,

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[3] In their First Amended Complaint, Plaintiff cite excessive force claims as support not only for Plaintiff's federal claim for violation of constitutional rights under the Fourth Amendment pursuant to 42 U.S.C. § 1983 (First Cause of Action) but also for Plaintiffs' state law assault and battery claims (Plaintiffs' Sixth and Seventh Causes of Action, respectively).

summary judgment is not appropriate in this case on the issue of qualified immunity."

The Court further found that Defendant D'Arcy was immune from liability for issuance of the press release after Plaintiffs' arrest.

In now moving for summary judgment a second time, Defendants ask the Court to rule in their favor as a matter of law as to each cause of action remaining in Plaintiffs' First Amended Complaint.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Rule 56 also allows a court to grant summary adjudication on part of a claim or defense. *See* Fed. R. Civ. P. 56 (a) ("A party seeking to recover upon a claim ... may... move ... for a summary judgment in the party's favor upon all or any part thereof."); *see also* Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter Township of Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

The standard that applies to a motion for summary adjudication is the same as that which applies to a motion for summary judgment. See Fed. R. Civ.P. 56 (a), 56(c); Mora v. ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998) .

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Once the moving party meets the requirements of Rule 56 by showing that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Genuine factual issues must exist that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." Id. At 250. In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *See* T.W. Elec. V. Pacific Elec. Contractors Ass'n, 809 F.2d 630-631 (9th Cir. 1987), citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

ANALYSIS

In considering Defendants' various requests for summary judgment/adjudication, which extend both to particular claims as well as individual parties, it should first be clarified just what claims remain in dispute at the close of briefing and oral argument in this matter. Specifically, Plaintiffs have not opposed summary adjudication as to their claims for equitable relief pursuant to the Second and Third Causes of Action, and further do not oppose summary judgment as to the Fifth Cause of Action (False Imprisonment/False Arrest) and the Ninth Cause of Action (for violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961-68). Summary adjudication as to those causes of action is therefore granted.[4] In addition, the Court's prior

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[4] It should also be noted that the Joint Pre-Trial Conference Statement, filed on March 8, 2004 and signed on behalf of both Plaintiffs

July 8, 2003 ruling disposes of Plaintiffs' state law defamation and libel claims (as stated in the Eighth Cause of Action, which alleges that Defendants are liable for press releases to the printed and wireless media) because the Court found that the release at issue was privileged as a matter of law.

Each of Plaintiffs' remaining claims, as well as the liability of individual defendants, will now be addressed.

A. Plaintiffs' Section 1983 Claim

Plaintiffs have pled a multifaceted Section 1983 claim with numerous theories of liability. Under the broad rubric of the Fourth Amendment's prohibition of unreasonable search and seizure, they allege 1) that Defendants engaged in judicial deception by presenting false and/or misleading information to the state court judge who issued the search warrant for Plaintiffs' residence; 2) that Defendants conspired with each other to engage in such false/misleading behavior by claiming that various members of the MET Team had provided similarly false/misleading information to state judicial officers in the past; and 3) that Defendants utilized excessive force in effectuating the search of Plaintiffs' residence and their subsequent arrest.

As an initial matter, summary judgment cannot be had as to Plaintiff's Section 1983 claim for the simple reason that this Court has already determined that the excessive force component of the claim is not amenable to summary judgment as requiring "credibility determination[s]... squarely within the province of a jury." (July 8, 2003 Memorandum and Order, 11:22-12:1). Because the Section 1983 claim accordingly survives, the Court is loathe to

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and Defendants, confirms at paragraph XV that these causes of action have been abandoned.

engage in piecemeal disposition of other issues that will not be dispositive of the claim as a whole. Nonetheless, even a cursory examination of the circumstances of this case indicates that all of Plaintiff's Section 1983 contentions require complicated factual assessments making them ill-suited to resolution on summary judgment. Triable issues of fact clearly exist, for example, as to whether Potter engaged in judicial deception in this case, and whether other MET Team members conspired to do so based on inferences discernible from their conduct on other occasions. Summary judgment as to Plaintiffs' First Cause of Action is accordingly denied.[5]

B. Pendent State Law Claims

In addition to their Section 1983 claim, Plaintiffs also have three remaining state law claims. The Fourth Cause of Action, which alleges a violation of Article I, Section 13 of the California Constituion, is asserted against Defendant Potter. In their Sixth Cause of Action, Plaintiffs plead assault against Defendants Reed, Goodpastor, Besana, Potter and Reed. Finally, by way of the Seventh Cause of Action, Plaintiff seeks damages from Defendants Potter and Reed for battery.

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[5] Although not specifically pled in Plaintiffs' First Amended Complaint, Defendants also request the Court to rule in their favor to the extent said complaint may seek to impose liability on Defendant County pursuant to Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). Any Monell claim here would appear to fall within the purview of the Plaintiffs' cause of action for violation of Section 1983. Just as summary judgment cannot be granted as Plaintiffs' Section 1983 claims as a whole, the Court cannot decide as a matter of law that the County"s training of its MET Team officers was inadequate, or that the County did not engage in a custom or practice to violate the constitutional rights of marijuana cultivators like Plaintiffs herein. Any such determinations clearly require the same kind of factual determinations that cannot be resolved through summary judgment.

The Fourth Cause of Action pleads a violation under the California Constitution for Defendant Potter's alleged presentation of a false search warrant affidavit, just as Plaintiffs' Section 1983 claim makes the same assertion under the federal constitution. The reasons why summary judgment cannot be had as to the federal claim are equally applicable to its state law counterpart.

With respect to the assault and battery claims, as indicated above this Court has already ruled, in the context of the excessive force component of Plaintiffs' Section 1983 claim, that any determination as to what occurred on September 23, 1998 requires credibility determinations not amenable to disposition on summary judgment. That reasoning also precludes summary judgment as to Plaintiffs' state law claims premised on the same alleged excessive force.

Although the causes of action which continue to be asserted by Plaintiffs remain viable, that does not mean that all the defendants named by Plaintiffs should either remain in this lawsuit or continue to be parties as to certain claims. We now turn to the liability of individual defendants.

C. Liability of Individual Defendants

1. Brian Whigam. As indicated above, Defendant Whigam's only involvement in this case was in offering testimony at the Preliminary Hearing on Plaintiffs' criminal charges. Whigam did not participate in the garbage search, did not seek a search warrant and was not involved in the entry and search of Plaintiffs' residence. Nor was he a member of the MET Team at the time of said entry and search. Whigam did testify as to the potential yield of the marijuana garden maintained by Plaintiffs, as well as the amount of marijuana typically consumed by a user.

The general rule that police officers are absolutely immune when providing testimony is subject to an exception for complaining witnesses who actually bring about a prosecution through perjured testimony. *See* Harris v. Roderick, 126 F.3d 1189, 1198-99 (9th Cir. 1997). In this case, there is no question that marijuana has no medical use which would except it from the Controlled Substances Act. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 493 (2001). Plaintiffs unquestionably had 146 marijuana plants growing in their home. Whigam's testimony had no bearing on that undisputed fact, and it is illogical to assume, as Plaintiffs apparently do, that they would not have been prosecuted in the absence of Whigam's testimony. Hence the exception to an officer's absolute immunity as articulated in Harris does not apply here. Further, as Defendants point out, predictions of yield are necessarily somewhat imprecise and Whigam based his testimony on his experience and training over years of investigating marijuana related offenses. There is no evidence that he deliberately lied or misled the Grand Jury during Plaintiffs' Preliminary Hearing. As such, summary judgment in Whigam's favor is proper.

2. Stephen D'Arcy. Undersheriff D'Arcy's sole involvement in this case was his dissemination of a press release after Plaintiffs' arrest. As stated above, this Court has already ruled that his issuance of that release was privileged. Although that finding resulted in summary judgment as to Plaintiffs' state law libel and defamation claims as a result of the allegedly offending press release, Plaintiffs now attempt to resurrect the same claims in the context of their Section 1983 claim under the "stigma plus" test recognized by Paul v. Davis, 424 U.S. 693, 711 (1976) *(See also* WMX Technologies Inc. v. Miller, 80 F.3d 1315, 1319-20 (9th Cir. 1996)).

To begin with, Plaintiff's Section 1983 claims are

limited on their face to allegations that Defendants violated Plaintiffs' right, under the Fourth Amendment, to be free from unreasonable search, seizure, and excessive force. (First Amended Complaint, ¶ 28). Plaintiffs' defamation claim under Section 1983 does not fall within the Fourth Amendment, and instead arises under Fourteenth Amendment liberty protections. WMX Technologies, 80 F.3d at 1319. In addition, Plaintiffs cannot meet the "stigma plus" test for imposing liability under Section 1983 in any event.

The "stigma plus" test requires that defamation be accompanied by an injury directly caused by the government, rather than an injury caused by the act of some third party in reaction to the government's alleged defamatory statements. Id. at 1320. Here any damage to Plaintiffs' reputation or business was, at most, only in reaction to the press release issued by Defendant D'Arcy. Such damages are not recoverable through Section 1983. Id. Summary judgment terminating Defendant D'Arcy's involvement in this case is therefore appropriate.

3. Other Defendants. Given the conspiracy allegations as outlined above, the Court is unwilling to grant summary judgment as to any of the members of the MET Team. Defendants Grant, Goodpaster and Besana nonetheless have no place in Plaintiff's Sixth Cause of Action, for assault. No evidence has been presented to suggest that any assault as to Plaintiffs was conspiratorial in nature. It is uncontroverted that the only defendants who even arguably "assaulted" Plaintiffs in the course of effectuating their arrests were Officers Potter and Reed.[6] Plaintiff Chacko saw no physical misconduct on the part of any other officer besides Potter. (Chacko Deposition, 43:17-24, 44:5-22, 44:23-46:9).

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[6] The Court declines to accept any argument on the part of Plaintiff Chacko that other officers "visually groped" her and may consequently be potentially liable for assault on that basis.

Plaintiff's Baldwin's testimony as to any other officer besides Reed is in accord. (Baldwin Deposition, 111:3-112:7, 166:17-20, 113:23-116:22, 168:22-169:19, 166:21-167:3).

CONCLUSION

For the reasons above, Defendants' Motion for Summary Judgment is DENIED. Summary adjudication is granted, however, as to the Second, Third, Fifth, Eighth, and Ninth Causes of Action. In addition, summary judgment is granted as to Defendants Whigam and D'Arcy. Finally, Defendants Goodpastor, Grant and Besana are entitled to summary adjudication in their favor as to the Sixth Cause of Action, for assault.

IT IS SO ORDERED.

DATED: April 2, 2004

/s/
MORRISON C. ENGLAND Jr.
UNITED STATES DISTRICT JUDGE

TO BE RECOVERED

Supreme Court, U.S.
FILED
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No. 05-0587

In The

Supreme Court of the United States

MARK REED,

Petitioners,

v.

MICHEAL BALDWIN DDS

Respondents,

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In analyzing the preliminary issue on a question of qualified immunity in an excessive force case, whether the officer's conduct violated the Fourth Amendment, did the Ninth Circuit fail to account for governmental interests that justified the application of force during a residential search for drugs, at a point before the residence and the occupants were secured, and instead improperly focus on the profession of the suspect (dentistry) to conclude that officers performing such drug searches face minimal, if any, exigencies that might justify the use of force?

2. In analyzing the second issue on a question of qualified immunity, whether clearly established law reasonably informed the officer that the conduct in question was unlawful, did the Ninth Circuit's opinion that there is a clearly established right "to be free from battery by gun-wielding officers" ignore controlling Supreme Court precedent by formulating "clearly established law" at so general or abstract a level that the notice requirement was rendered meaningless?

PARTIES TO THE PROCEEDINGS

Petitioner

Mark Reed, Auburn California,

Respondent

Michael Baldwin DDS, Carmichael, California.

The following parties named in the caption of the underlying action have not petitioned for review: Placer County, Placer County Sheriff's Department, Brian Whiggam, Kevin Besana, Ron Goodpaster, Stephen L. D'Arcy and Tracy Grant.

Jeff Potter has filed a separate petition for review.

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INTRODUCTION

Petitioner seek review by this Court asserting that the lower courts failed to consider the government interests in the use of force against Respondent and granted undue deference to Respondent Dr. Baldwin's white collar profession, and improperly denied Petitioner qualified immunity for battering Respondent during the execution of a search warrant. Petitioner has not established that the decision of the Ninth Circuit court conflicts with other court of appeal decisions, is in conflict with decisions of this court, or represents an important question that should be addressed by this court, but rather Petitioner's claims of error consist of nothing more than claims that the court misapplied properly stated rules. Petitioners claims misstate the record and fail on the merits.

STATEMENT

For purposes of appeal and summary judgment motion, Petitioners have conceded that the facts as presented by the Respondents are undisputed.

In the early dawn hours of September 23, 1998, a group of five officers entered Respondents Dr. Baldwin and Georgia Baldwin (now Chacko's) home "para-military style" without knocking. Officer Potter, among them, was the author of the Search Warrant Affidavit. The circumstances of the search warrant affidavit are set forth in a *Potter, v. Baldwin and Chacko*, case number 05-586, also before this Court on a Petition for Writ of Certiorari.

Once inside the residence, Reed encountered Dr. Baldwin as Baldwin came into the house from the back door. Reed pointed his gun at him and ordered him to lie down. Baldwin complied with the order. Reed placed his knee in the small of Baldwin's back. Reed then escalated the use of force

against Dr. Baldwin by pushing his gun directly against the rear of and Baldwin's head. Baldwin was terrified that the gun would go off the whole time the gun was pressed against his head. At no time did Baldwin offer any resistance to Officer Reed, and he had complied, and continued to comply with all of Reed's instructions.

Nothing in the search warrant affidavit stated any belief that anyone at the residence would be armed, nor was any criminal history or conspiracy asserted that could justify such a belief. Petitioner was aware that respondent was a practicing dentist, as Petitioner had supplied information from a confidential informant to others for inclusion in the search warrant affidavit. This included respondent's occupation, and did not include any information that Respondent was involved in drug trafficking or other illegal conduct other than "possibly growing marijuana." Contrary to Petitioner's assertion, nothing in the record indicates that at the time of Reed's conduct the residence was not secured, and in fact it is conceded that respondent was complying with Reed, lying face down and prone on the ground with his hands behind his back.

After they picked up Dr. Baldwin, they began to interrogate him. Baldwin told the officers that he and Chacko were bona fide medical marijuana patients and that he was cultivating in accordance with the only guidelines existing in the state pursuant to California Health & Safety Code Section 11362.5, guidelines which were adopted by the City of Oakland. He also told them where to find their physician's recommendations and requested the officers to call and verify that it was a valid recommendation under California Health & Safety Code Section 11362.5. The number of plants found in the residence was within the Oakland City Guidelines. At the time of the search Placer County had no guidelines regarding the number a plants a patient could legally cultivate, while the

City of Oakland was the only jurisdiction in the State of California to adopt guidelines.

Ultimately, all criminal charges were dropped against Dr. Baldwin and Mrs. Chacko.

Based upon this, Ninth Circuit panel (agreeing with the District Court) held correctly that Reed's conduct in placing a loaded gun against Baldwin, who was complying with his instructions and lying prone face down on the floor was excessive force, and that a reasonable officer, given all the circumstances, would know that a battery committed by placing a loaded gun against a complying and prone suspect was excessive force. Reed has asserted no facts to suggest any belief that Respondent would be armed, and in the search warrant affidavit there was no mention of any criminal history or conspiracy that could have justified such a belief. Thus, when Reed encountered Baldwin, clothed in a t-shirt, and ordered him to the ground, and Baldwin complied and offered no resistance, escalating the force to include a battery by placing a loaded gun against his head was an impermissible use of excessive force. The Court held that officers had notice that such batteries were excessive force in the Ninth Circuit since 1984, per the decision in *McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1010.

Additional facts are set forth in Respondent's Opposition to Petition for Writ of Certiorari in *Potter v. Baldwin and Chacko*, case number 05-586, currently before this Court. These facts correct additional misstatements of facts presented in Petitioner's brief, and are incorporated by this reference into this statement.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit correctly analyzed Petitioner Reed's conduct under Michigan v. Summers (1981) 542 U.S. 692, and correctly concluded that the battery against Respondent by placing a loaded gun against the head of a complying and prone suspect was excessive force.

In their petition for rehearing, Petitioners concede there was no exigency based upon the particular facts of this case to justify the battery upon Dr. Baldwin, and instead seek a per se rule that whenever an officer enters to serve a warrant for suspected possession and cultivation of cannabis, the exigency of that circumstance alone allows the officers to commit battery upon the occupants, including battery by placing guns against the heads of prone, complying suspects who are lying on the ground per the officers' instructions. At the outset, no facts suggest that the residence had not been secured when the batteries by use of the guns occurred. Petitioner makes reference to this, and attempts to create a general "exigency" argument, based upon no facts, to justify the reasonableness of the force used. This ignores that the batteries in using the guns were an escalation of force, not justified by the facts of the investigation, not justified by any facts learned during the entry, and not justified by anything encountered by Reed once inside.

In *Michigan v. Summers* (1981) 452 U.S. 692 the Supreme Court recognized that officers entering to execute a search warrant may use reasonable force to effect that search warrant. While the decision expressly authorizes officers to routinely exercise "unquestioning command of the situation", nothing in that decision suggests that officers are free to commit batteries by placing their guns against the heads of suspects. The determination of the acceptable or reasonable level of force is always a factual determination given the

individual facts of each case. (*Liston v. County of Riverside* (9th Cir. 1997) 120 F.3d 965)

Petitioners' sole justification for the use of force here rests upon the fact that the officers were executing a search warrant for suspected cannabis, and Petitioner argues that this makes the level of force reasonable. But the "unquestioning command" of the situation taken by the officers is not the conduct complained of by Respondent. Dr. Baldwin does not alleged that there was excessive force when Reed and other officers entered with their guns drawn, or when Reed ordered him to the floor, handcuffed him and detained him in handcuffs.

The excessive force in this case arose when Reed committed a battery against Michael Baldwin by placing a gun to the back of his head where there was no reasonable justification for that level of force. This was an escalation of force against Dr. Baldwin simply not justified where he was lying on the floor face down, per the instructions of the officer, with the officer's knee in the small of his back, as he was being handcuffed. Reed exercised force to effect command of the situation, ordered the Respondent to the floor, and when complying, Reed then escalated the force to include the battery complained of.

Having no facts to justify the escalation of force that culminated in the battery against Dr. Baldwin, Petitioner relies upon a generalized, "exigency" unsupported by facts and claims that the Ninth Circuit placed undue deference to his white collar profession in their decision. The Court was correct, however, in applying the *Graham* test, as the government interest was at a bare minimum as they had achieved compliance and control of the occupants and residence, while the level of intrusion was beyond the bounds

of reason. (*Graham v. Connor* (1989) 490 U.S. 386, 396) Moreover, they did not grant undue deference to Respondent's white collar occupation in their decision, but rather simply included it in the analysis of all facts of this case. This one fact does not change or alter the analysis that a gratuitous battery, committed by use of a loaded gun against the head of a complying suspect lying face down on the floor, was excessive force.

Without specific facts to demonstrate a legitimate governmental interest in the force used, Petitioner Reed simply seeks a per se rule that not only would allow battery against peaceful compliant suspects by officer whenever cannabis is suspected, but more particularly a rule that would allow the escalation of force to include batteries after the officers have gained compliance by, and control over, suspects. Such a rule does not exist in the holding of *Michigan v. Summers* allowing "unquestioning command" of the situation to be taken by officers. Nor does *Mena* help Petitioner, as the intrusion complained of which involved the use of handcuffs during a search for a violent and armed gang member. (*Muehler v. Mena* (2005) 125 S.Ct. 1465) In *Mena*, while the exigency based upon those facts was greater, the force used by the officers was significantly less. While it might be difficult to imagine a set of facts that would justify placing a gun against the head of a suspect as a legitimate use of force, Petitioners reliance on the single fact that the officers were entering the premises looking for cannabis is completely inadequate. When added to the facts that the officers had no facts to suggest that they would encounter resistance, and that Dr. Baldwin was complying with the officer's instructions, was lying on the floor, and had not resisted at all when the battery occurred, the legitimacy of this use of force is not even a close call. The force was clearly excessive. As the court correctly analyzed Petitioner's conduct under the correct standards, this Petition should not be granted.

II. The Ninth Circuit was correct in concluding that it was clearly established that placing a loaded gun against the head of a complying and prone suspect was excessive force, and therefore was correct in denying Petitioner qualified immunity.

Having failed to show the conduct was not excessive force, Petitioner seeks qualified immunity for Officer Reed for the gratuitous battery against Dr. Baldwin. At the time of the search however, the law was clearly established that placing a loaded gun to the head of a cooperating and complying suspect who is lying face down and prone on the ground with his hands behind his back, while an officer has his knee in the small of the suspects back, is excessive force. (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005)

Arguing that the Court applied *McKenzie* to provide notice to Petitioner at too high a level of generality because the batteries in *Mckenzie* were after the suspects were handcuffed and accompanied by taunting comments not only completely ignores the long standing distinction between assault and battery, but also ignores the facts in this case. The battery against Dr. Baldwin occurred while he was lying prone on his stomach with his hands behind his back as ordered by the officer, with the officer's knee in his back, and happened from before to right after he was being handcuffed. The facts of *McKenzie* and the present case are quite similar, given that in both cases the suspects were subdued and the batteries by use of the guns were a gratuitous escalation of force completely unnecessary under the facts of each case. Moreover, while petitioner also attempts to distinguish *McKenzie* by stating that the plaintiff's in that case "were in fact innocent of any crime" (Pet. page 15), as all criminal charges against Respondent and his wife were dismissed, Respondent was also innocent of any crime. While this fact is not properly part of the analysis of qualified immunity, it is telling of the extreme similarity of the

cases. Thus, contrary to Petitioner's assertion, it is simply not too high a level of generality to read *Mckenzie* as providing fair notice that the gratuitous escalation of force to include battery by use of a gun against the head of a prone, complying, non-resisting suspect was excessive force.

Petitioner then applies convoluted reasoning to argue that since the officers in *Robinson* didn't have notice that their conduct was excessive force, even though it was, then Petitioners herein didn't have notice under *McKenzie* that long standing and critical distinction between an assault, as occurred in *Robinson*, and a battery accomplished by placing a gun against the head of a complying and prone, non resisting suspect, as occurred in this case and *McKenzie*.

Since *Mckenzie* was decided in 1984, a reasonable officer in the Ninth Circuit should know that it has been clearly established that committing a battery by sticking a gun against the head of a complying suspect who is lying face down as instructed by the officer, who has offered no resistance, where there has been no mention of weapons in the search warrant affidavit, is excessive force. As the court correctly analyzed Petitioner's conduct under the correct standards, this Petition should not be granted.

CONCLUSION

Wherefore, premises considered, Respondents respectfully request that the Petition for Writ of Certiorari filed by Petitioner be denied.

Respectfully submitted,

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(3)

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No. 05-587

IN THE

Supreme Court of the United States

MARK REED,

Petitioner,

v.

MICHAEL BALDWIN,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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No. 05-587

IN THE

Supreme Court of the United States

MARK REED,

Petitioner,

v.

MICHAEL BALDWIN,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

The repeated failure of the Ninth Circuit to determine "clearly established" law at the appropriate level of particularity places peace officers in the Ninth Circuit at risk of civil trials that should be barred by the qualified immunity of good faith. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). In this case, the Ninth Circuit's overbroad application of precedent to find a "clearly established" right "to be free from battery by gun-wielding officers," thereby denying

qualified immunity to Petitioner Reed, conflicts directly with *Saucier* and *Brosseau v. Haugen*, 543 U.S. 194; 160 L.Ed.2d 583 (2004). In both *Saucier* and *Brosseau*, this Court reversed the Ninth Circuit for failure to determine "clearly established" law in a more "particularized" sense. *Brosseau*, 160 L.Ed. 2d at 599; *Saucier*, 533 U.S. at 200. The Ninth Circuit appears to be unique in its refusal to follow this Court's precedent with respect to the second inquiry in determining qualified immunity in Fourth Amendment excessive force cases, and, as in *Brosseau*, its decision in this case in clearly erroneous.

SHOULD THIS COURT REQUIRE LOWER COURTS TO ALWAYS DECIDE THE FIRST QUESTION IN QUALIFIED IMMUNITY ANALYSIS?

Of course, the first inquiry in determining whether qualified immunity applies in the context of alleged excessive force by a peace officer is whether the conduct violated the Fourth Amendment rights of the plaintiff. Whether or not this inquiry should always proceed before deciding the second inquiry was decided in *Saucier*, but then questioned by a concurrence in *Brosseau*, 160 L.Ed.2d at 591 (Justices Breyer, Scalia and Ginsberg). Justice Stevens has also questioned this procedural requirement in *Bunting v. Mellon*, 541 U. S. 1019 (2004).

Whether or not the facts in this case constitute a violation of the Fourth Amendment is a close question that, like many other close questions, could lead to unnecessary constitutional pronouncements by the lower courts where qualified immunity is clearly available. See Justice Breyer's concurrence in *Brosseau*, 542 U.S. at 591. To continue this practice of requiring lower courts to decide close

constitutional questions based on specific factual scenarios before deciding potentially easier questions of clearly established law, may result in a series of published district court and circuit court opinions establishing specific police procedures. However, having the lower courts establish police procedure that officers in the field must apply in situations, like this one, where they must make "split-second judgments - - in circumstances that are tense, uncertain and rapidly evolving" may lead to the hesitancy to act that the qualified immunity was intended to prevent. *Graham v. Connor*, 490 U.S. 386, 397 (1986). This petition for certiorari further presents the Court an opportunity to revisit its position, questioned by four Justices, on this ongoing procedural controversy.

RESPONDENT MAKES THE FUNDAMENTAL ERROR OF RELYING UPON 20-20 HINDSIGHT TO ARGUE THAT REED APPLIED THE FORCE IN QUESTION AFTER THE HOME WAS "SECURE"

Respondent argues that Petitioner Reed should have known that committing a battery with a weapon upon a cooperative suspect was clearly unlawful because of *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984). Respondent attempts to harmonize *McKenzie* with the facts of this case by asserting that here too the battery occurred after the officers had "secured" the battered person. Respondent and the Ninth Circuit see no difference between force directed at a suspect cooperating with an officer prior to handcuffing (this case) and force directed at a suspect wearing handcuffs (*McKenzie*).

Perhaps there is none from the perspective of a dentist, but there is a significant difference from the perspective of an objectively reasonable officer searching a home before all occupants have been located and handcuffed. It does not require an expert in police procedure to know that if a suspect chooses to resist before he or she is handcuffed, the suspect presents a significantly greater threat to the officer than that suspect would present if he or she resisted while wearing handcuffs. Common sense should also suffice to inform respondent and the Ninth Circuit of the potential dangers presented to an officer responsible for performing a search of a home for illegal drugs by an unhandcuffed home owner, who, an officer could reasonably believe, knows where knives, screw-drivers, bats, scissors, and other potentially lethal weapons including guns are located within the home.

Although Mr. Baldwin was on the ground and Officer Reed had a knee on his back, Mr. Baldwin was not handcuffed when Officer Reed allegedly put a gun to the back of his head. From the perspective of an objectively reasonable officer mindful of officer safety issues, almost handcuffed is not handcuffed. At that moment, Officer Reed had no way of knowing Mr. Baldwin's skills or lack thereof in hand-to-hand fighting. Although we now know that Mr. Baldwin never attempted to fight, that after acquired knowledge does not retroactively eliminate the risk to Deputy Reed that Mr. Baldwin might have chosen to fight during the seconds before being handcuffed.

After Deputy Reed handcuffed Mr. Baldwin, thereby significantly diminishing Mr. Baldwin's ability to resist effectively, petitioner agrees that a battery with a gun would violate the Fourth Amendment. That obvious proposition is what *McKenzie* held in 1984. In trivializing the risks

presented to Officer Reed in the seconds before he handcuffed Mr. Baldwin, respondent and the Ninth Circuit err by failing to consider the situation from perspective of an objectively reasonable officer initiating a residential search for illegal drugs. *Graham*, 490 U.S. at 396-397.

THE BATTERY HERE IN QUESTION WAS NOT EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT

The force employed by Deputy Reed in this case was not disproportionate to the risk he faced. Deputy Reed did not strike Mr. Baldwin with the gun, did not shoot the gun, and did not make any verbal threats about shooting the gun. Deputy Reed was not physically rough with Mr. Baldwin and did not verbally threaten or abuse him. Mr. Baldwin suffered no physical harm. The only force at issue in this case is Mr. Baldwin's allegation that Deputy Reed placed a gun to the back of his head for approximately 20 seconds, causing fright and anxiety. Deputy Reed then holstered his gun and handcuffed Mr. Baldwin.

Mr. Baldwin was the first occupant of the home encountered by Deputy Reed after having entered the residence. At that time, Deputy Reed had no way of knowing who else might be present in the Baldwin home. Certainly, he would not want to holster his weapon until he was confident that no other occupant was approaching him. Rather than immediately take his focus off of the surrounding areas to handcuff Mr. Baldwin, an objectively reasonable officer could keep his focus on approaches to the room while straddling Mr. Baldwin, who was lying face down on the floor. Certainly, a reasonable officer in the position of Deputy Reed would not want to be surprised by

some other potentially hostile occupant while his attention was momentarily diverted to handcuffing Mr. Baldwin.

While taking that short interval (20 to 30 seconds) to see that no other occupant was coming to that location prior to putting away his weapon and handcuffing Mr. Baldwin, and to ensure that Mr. Baldwin did not choose that time to resist, an objectively reasonable officer could have put a gun to the back of Mr. Baldwin's head to take "unquestioned command" of the situation. *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981). Certainly, there is no clear case law cited by the Ninth Circuit or to this Court to inform officers that such conduct under similar facts is excessive force. An objectively reasonable officer might not have considered the placing of a gun to the back of Mr. Baldwin's head substantially more threatening than pointing a gun at Mr. Baldwin's head or body, either of which can be excessive force if occurring without any justification. See *Robinson v. County of Solano*, 278 F.3d 1007, 1014-1015, *Turmon v. Jones*, 402 F.3d 202, 207-208 (4th Cir. 2005), *McKenzie*, 738 F.2d at 1010-1011. Whether pointing a gun at a suspect where the suspect can see it to gain compliance is more terrifying than placing a gun to the back of the suspect's head is a subjective judgment. Is it more frightening to see the barrel than to feel it?

In contrast to *Robinson*, *Turmon*, and *McKenzie*, however, here Petitioner Reed's alleged force was justified by the risks inherent in performing a drug search before the suspects and the residence are secured. Once assured that no more occupants may be approaching his position, an objectively reasonable officer in the position of Deputy Reed would then holster his weapon and handcuff Mr. Baldwin.

Petitioner is not arguing that police officers ought to use these tactics during residential searches for drugs, that better tactics do not exist, or that there should be a per se rule that under all circumstances putting guns to the heads of persons before they are handcuffed is acceptable force. However, under these facts, petitioner should not have to stand trial for an alleged violation of the Fourth Amendment that can be objectively justified, that caused no physical harm, that only marginally increased, if at all, the emotional distress inherent when police search a home for drugs with guns drawn and pointed at the occupants (presumably even more stressful where, as here, substantial quantities of marijuana are present in the home), and that can be easily fabricated by any person who takes umbrage at being ordered to the ground and handcuffed by a peace officer.

CLEARLY ESTABLISHED LAW DID NOT INFORM PETITIONER REED THAT THE CONDUCT ALLEGED AGAINST HIM IN THIS CASE COULD VIOLATE THE CONSTITUTION

The Ninth Circuit and respondent rely upon one case, *McKenzie*, as a basis for the "clearly established law" governing the outcome of this case. As discussed above and in the Petition, the facts of *McKenzie* differ too much from the facts of this case for it inform Deputy Reed of the probable outcome litigation over the force alleged by Mr. Baldwin.

Moreover, the principle of "clearly established law" articulated by the Ninth Circuit in this case, the supposed right to be "free from battery by gun-wielding officers," is woefully overbroad. Taken at face value, that would mean that an officer could never put a knee on the back of a suspect lying on the floor without first holstering his or her

gun, or could not handle a suspect without first holstering his or her gun.

While perhaps a close call as to whether or not the conduct complained of by Baldwin violates the Fourth Amendment, no cases clearly informed Deputy Reed that the conduct alleged against him here was unconstitutional. At worst, Petitioner Reed's alleged conduct falls within the "sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. 194, 206 (2001)

CONCLUSION

For the same reasons that the petition for certiorari was granted in *Brosseau*, it should also be granted here. Deputy Reed has suffered the identical harm in being denied the qualified immunity by the Ninth Circuit for the same improper reason as occurred in *Brosseau*. The Ninth Circuit has again frustrated the purpose of qualified immunity as applied to peace officers by formulating "clearly established law" at a level of generality that ensures that peace officers will be subjected to civil trials for conduct that case law has not reasonably informed them might potentially subject them to liability.

Respectfully submitted,

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